

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLEARARTHUR HARDY,

Defendant-Appellant.

UNPUBLISHED

January 26, 1999

No. 205247

Oakland Circuit Court

LC No. 97-150559 FC

Before: Kelly, P.J., and Hood and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and was sentenced to life imprisonment without parole. Defendant now appeals as of right. We affirm.

First, defendant argues that his trial counsel was ineffective for failing to move to suppress evidence of an alleged domestic assault involving the victim's mother or to request a limiting instruction. To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and that the representation was so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997). This Court presumes that decisions as to what evidence to present is a matter of trial strategy. *People v Wyngaard*, 226 Mich App 681, 685; 575 NW2d 48 (1997). That a strategy does not work does not render its use as ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

The first time testimony was elicited regarding domestic assault was during the direct examination by the prosecution of the victim's mother. As the prosecution was attempting to elicit testimony related to a threat arguably directly related to the victim's murder, the witness testified that defendant had threatened to cut her with a knife. The testimony appears from the record to have been a response that neither the prosecution nor defendant's attorney expected. The prosecution did not inquire further regarding the knife threat. Rather, he directed the testimony toward the threat which was

arguably related to the victim's murder. Defendant's attorney's decision not to emphasize the response regarding the knife threat by requesting a curative instruction was a matter of trial strategy which this Court will not second-guess. *People v Coddington*, 188 Mich App 584, 608; 470 NW2d 478 (1991).

The second incident of testimony regarding spousal assault was elicited during cross-examination of the mother by defendant's attorney. The record indicates that one of defense counsel's strategies at trial was to show that the mother did not wake up during the night as a result of defendant leaving their bed or from noises related to the victim struggling to escape defendant and that she would have awoken if either event had occurred. Whether this was in fact a sound strategy is, as a matter of law, not for this Court to second guess. *Stewart, supra* at 42. However, while counsel was establishing this defense, the mother testified that she was awakened by defendant requesting that she dismiss spousal abuse charges she had brought against him. It was not apparent from the record whether defense counsel anticipated that the question would elicit an answer related to spousal abuse. Absent the advantage of hindsight or a *Ginther*¹ hearing, we cannot say that defense counsel performed below the standards of a reasonably competent attorney.

The third incident defendant cites was testimony elicited by the prosecutor to clarify a question asked by the jury regarding the history and nature of the spousal abuse. The question asked by the prosecutor during redirect examination did not exceed the scope of cross-examination, where defense counsel had elicited testimony regarding the spousal abuse. Therefore, it was proper and defendant's trial counsel had no grounds for objection. See *People v Weatherford*, 193 Mich App 115, 121-122; 483 NW2d 924 (1992). Defense counsel was not required to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant argues that his trial counsel was ineffective for failing to request a limiting instruction regarding the spousal abuse and knife threat. However, to prevail on this claim, defendant must show, beyond mere conclusory statements, that his counsel's conduct prejudiced him and did not constitute sound trial strategy. *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). We believe that any prejudice from the testimony regarding the spousal abuse and knife threat was not so substantial that it could have changed the outcome of the trial. See *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). In light of the testimonial evidence detailing defendant's admission that he went into decedent's room, touched her, and then held her down until she stopped moving, along with defendant's apparent attempted suicide after the incident in question, the evidence of spousal abuse and threats, while most likely improperly admitted, does not appear to be of a substantial quality that would alter the outcome of the trial. *Id.*

Defendant also argues that the trial court abused its discretion in denying his motion for new trial based on the jurors' bias against him. On the fourth day of trial, following a recess, the jury sent a note to the judge indicating that several jurors were uncomfortable with the distracting behavior of defendant's attorney's assistant. The assistant did not appear in the courtroom the following trial day. Defense counsel refused the trial court's offer to put a statement on the record and indicated that she would rather not refer to it.

We believe that defendant has not shown how the jurors' were biased against him in determining a verdict. The jury was instructed by the trial court to "return a true and just verdict based only on the evidence and on my instructions on the law," to "not let sympathy or prejudice influence your decision," and to "consider the evidence that has been properly admitted in this case." Any prejudice that the jury may have felt toward defendant was removed by the trial court's instructions. Therefore, since this Court should not reverse a conviction unless the error was prejudicial, the trial court properly denied defendant's motion for new trial. See *People v Mateo*, 453 Mich 203, 210-212; 551 NW2d 891 (1996).

Defendant also argues that the note from the jurors, which indicated they had reached a verdict and requested that they be escorted to their cars by uniformed officers, showed that the jury was biased against him. However, defendant is merely speculating that this note showed that the jury was afraid of repercussions by him. After reviewing the record, we found no evidence which would cause the jurors to fear for their safety. Rather, the prosecution's speculation is just as plausible that the jurors were concerned about reaching their car without being approached by the media. Therefore, in light of the evidence supporting the verdict and the pure speculation that the jurors were fearful of repercussions from defendant, we find that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ Jane E. Markey

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).